STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2011
v	No. 290422 Wayne Circuit Court
DELL CRAWFORD, Defendant-Appellant.	LC No. 07-023226-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of first-degree murder but was convicted of second-degree murder, MCL 750.317. He was sentenced as a fourth habitual offender, MCL 769.12, to 20 years, 10 months to 45 years in prison. Defendant appeals as of right. We affirm.

The victim in this case was discovered on the bed in her bedroom. She was described as half sitting up in the bed, with one leg on the floor and one leg on the bed. She had six gaping wounds on her head, as well as a fractured skull and other broken bones. Moreover, a ring on a left-hand finger was crushed and the bone was broken; it was determined that the ring likely had been driven into her head when the hand suffered a blow. There was bleeding over the entire brain and some bruising of the brain.

It was undisputed that there was no splattered blood and that there was an insignificant amount on the victim and the bedding. The medical examiner and others testified that they would have expected substantial blood loss immediately upon infliction of the wounds if she were killed in her bedroom. Based on this evidence, police officers concluded that the victim was not assaulted on the bed. Notably, the mattress had apparently slid away in the opposite direction when the victim's body was placed on the bed.

Defendant first argues that the verdict was against the great weight of the evidence. We disagree. The appropriate test for determining whether a verdict is against the great weight of the evidence "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The determination requires a review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). The *Lemmon* Court indicated that, in evaluating a great-weight-of-the-evidence claim, a reviewing court cannot act as a "thirteenth

juror" and cannot base a determination solely on an assessment of the witnesses' credibility. *Lemmon*, 456 Mich at 636, 645. However, it recognized a conundrum in that "the issue of credibility of the witnesses is implicit in determining great weight or overwhelming weight of [the] evidence." *Id*. at 638. The Court concluded that a new trial could be granted based on questions related to witness credibility only in exceptional circumstances. *Id*. at 642. Elaborating, the Court stated that "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' . . . or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 410, 412; 124 NW2d 255 (1963). The focus is on whether there is "'a real concern that an innocent person may have been convicted' or that 'it would be a manifest injustice' to allow the guilty verdict to stand." *Id*. at 644.

Charles Rainer was the prosecution's main witness. He testified that around 7 or 7:30 a.m. on the day of the murder both he and the victim were there. She was in the bedroom asleep and he was getting ready to go to work. Defendant came into the house. Rainer further testified that defendant went into the bedroom and started an argument about money with the victim. He then testified that defendant picked up a wrench. He heard the victim say that she did not have the money. Rainer then went to the door and saw defendant take a couple of swings at her as she told him to stop. He then heard a couple of thumps. He then started to leave. He testified that as he was leaving, defendant told him he knew where he lived and worked and that he should say he left at 1:30 that night.

At approximately 11:00 a.m. on September 10, 2007, Officer James Woodside responded to a call and found the victim in a bedroom of her home. Sergeant John Falk said he arrived at the crime scene at 11:45. He further testified that for the size of the wounds, he found it strange not to see blood everywhere in the bedroom. He then testified that he went to the rear kitchen area and could smell cleaning solution in the sink and that a mop, which was still damp, was nearby. Officer Steve Howell also testified as to the extent of the victim's wounds and the smell of cleaning solution in the house.

Defendant argues that the lack of physical evidence that can link him to this murder makes this verdict against the great weight of the evidence. We disagree. The prosecution's theory of the crime, that defendant committed the murder and then cleaned up the scene of the crime, is supported by the evidence. First, there is the presence of cleaning solution, which would explain the absence of blood evidence. That is, that the absence of blood at the crime scene may be explained by the fact that defendant cleaned it up after murdering the victim.

Furthermore, Ranier's testimony does not compel the conclusion that the victim must have been killed in the bedroom, which would have resulted in a substantial amount of blood in the bedroom, including blood that would have soaked into the bed and been impossible to clean up. Rather, Ranier described hearing and seeing defendant attack the victim with a wrench and then he (Ranier) left. This, however, does not compel the conclusion that the murder was complete at this point. That is, the jury could reasonably conclude that defendant continued the attack after Ranier left and that the victim was able to flee the bedroom before being slain elsewhere in the house, only to be dragged back to the bed. More importantly, it is elsewhere that the substantial bleeding occurred and was cleaned up.

While this scenario is perhaps somewhat speculative, it is no more so than the apparent alternative theory that some unknown person must have killed the victim elsewhere and brought the body to her house and dumped it there. Ranier's description of the crime would defy "physical realities," *Lemmon*, 456 Mich at 646, only if Ranier testified that he observed the victim receiving the wounds that produced the bleeding while on the bed and/or the victim bleeding out on the bed. But Ranier testified seeing defendant with the wrench and swing it at the victim, hearing two thumps, and hearing the victim plead for defendant to stop. Ranier also testified that he could not see well into the bedroom because his view was blocked. Moreover, he testified that he did not even know that the victim was dead until he later went to the police station.

If the jury chose to believe Ranier's testimony, it would have concluded that defendant attacked the victim with a deadly weapon—the crescent wrench. It would then be reasonable for the jury to conclude that defendant finished the attack after Ranier left, dragged the body back to the bedroom and then cleaned up the crime scene. And while there are certainly reasons to question the credibility of Ranier's testimony, one of those reasons is not that his testimony compels the conclusion that the victim was murdered on the bed.

Questions of credibility should be left to the jury. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). The believability of the prosecution's theory is based on the credibility of the witnesses, and this Court must defer to the jury's determination on that issue.

Here, the jury had the opportunity to hear all the evidence and decide whether they believed that the witnesses were credible or not. The prosecution presented a plausible theory on how the victim was murdered. Defendant also presented a strong defense. If we sat on that jury, we might have had a reasonable doubt that defendant murdered the victim. But, we did not sit on that jury. We did not have the opportunity to observe the witnesses and gauge their credibility. The testimony was not so impeached as to be deprived of all probative value, indisputable physical facts were not contradicted, nor were physical realities defied. In sum, *Lemmon* sets a very high standard for setting aside a conviction based upon the great weight of the evidence and this case simply does not meet that standard.

Defendant also argues that the trial court erred in giving a lesser-included offense instruction for second-degree murder. Issues of law related to jury instructions are reviewed de novo, but the trial court's determination that the instruction was applicable to the facts is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

In *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007), our Supreme Court set forth the principle that a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. Defendant argues that there was no disputed element because the only defense raised was that defendant was not the perpetrator. However, if found to be the perpetrator, the jury would still have to discern the degree of defendant's guilt.

Defendant was charged with first-degree murder based on premeditation. MCL 750.316(1)(a). In *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006), our Supreme Court noted that the "intent necessary for second-degree murder is the intent to kill, the intent to inflict

great bodily harm, or the willful and wanton disregard for whether death will result." Here, a rational view of the evidence would support a finding that the murder was premeditated or that it occurred as the result of an intent to inflict great bodily harm. While the intent element of the crime was not the focus of the defense, the element of intent was not undisputed. The prosecution had to prove premeditation to secure a first-degree murder conviction or an alternative intent for the second-degree conviction. Accordingly, the instruction was proper.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra